

Connecting Theory and Reality: Teaching *Gideon* and Indigent Defendants' *Non-Right* to Counsel at Bail

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I have a confession. I love teaching *Gideon v. Wainwright*.¹ After all, when you think of Supreme Court rulings that represent the highest ideals of our legal system's commitment to equal justice and to fairness, you must seriously consider placing *Gideon*'s right to counsel on your short list of top ten (or five or three) all-time most important judicial decisions. I know I am not alone. Cases like *Gideon* are highlighted in virtually every criminal procedure casebook in the chapter devoted to the Sixth Amendment right to counsel. It is easy to understand why. In *Gideon*, we get to teach a stirring story about justice triumphing, an account of the "little guy's" fight against all odds to obtain a court appointed lawyer who then succeeds in gaining an acquittal and protecting his freedom and dignity rights. *Gideon* is the legal victory that makes Hollywood producers drool about the prospect of an award-winning movie² and allows book authors to dream of a Pulitzer Prize.³

Within the classroom, *Gideon* allows us to teach, and our students to experience, the justice system at its best. We provide hope that, with capable counsel, the disenfranchised and powerless can successfully defend against felony charges prosecuted by the all-powerful State. For those of you still unsure about whether there is room in your crowded syllabus to give *Gideon* a prominent place, take another look at the eleven-page opinion. I promise it won't take you long to read. I almost guarantee you will find the language refreshing and invigorating, particularly in these times of "peril,"⁴ when a suspected terrorist may be incarcerated indefinitely and denied counsel and access to court.⁵

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¹ 372 U.S. 335 (1963).

² Actor Henry Fonda brought the picture of Clarence Earl Gideon to life for many Americans in his starring role in *Gideon's Trumpet*. See GIDEON'S TRUMPET (Worldvision HV Inc. 1980).

³ Two-time Pulitzer Prize author Anthony Lewis told the story of one man's struggle to make the constitutional right to counsel a reality for every person accused of a felony crime. ANTHONY LEWIS, GIDEON'S TRUMPET (1964).

⁴ During periods of constitutional crisis, courts have retreated from protecting individuals' human and freedom rights. In 1852, as pro- and anti-slavery forces vied for supremacy, Missouri's high state court cited the perilous times that led to overruling a decision that had favored the Dred

Criminal procedure casebook authors showcase *Gideon* and usually include a second Supreme Court decision decided nine years later, *Argersinger v. Hamlin*,⁶ an attractive and logical choice for continuing the teaching of the Sixth Amendment. Describing the “assembly line justice”⁷ system in states’ lower criminal courts, *Argersinger* extended *Gideon*’s constitutional guarantee to counsel’s representation in petty misdemeanor offenses where a defendant receives a jail sentence. Referring to the “scant regard” these overworked misdemeanor courts are able to devote to most defendants’ cases, the Justices observed that “the gap between the theory [of individualized justice] and the reality is enormous.”⁸ In these lower courts, people are given “[i]nadequate attention” and are seen as “numbers on dockets, faceless ones to be processed and sent on their way.”⁹ Defense counsel is necessary, concluded the Court, to protect an accused’s pretrial and trial rights.

Here again law professors may find that including *Argersinger* in the assigned material for class discussion aids students’ understanding of the high volume, misdemeanor criminal justice system, while also promoting a positive image for how the judiciary responded to the right to counsel deficiency in states’ indigent defense systems. Concurring Chief Justice Warren Burger, for instance, appealed to lawyers’ high ideals and interest in promoting access to justice when he referred to the American Bar Association’s sweeping recommendation that counsel should be appointed “in *all* criminal proceedings for offenses punishable by loss of

Scott family’s suit for freedom. “Times now are not as they were when the former decisions [granting emancipation] . . . were made. Since then not only individuals but States have been possessed with a dark and fell spirit in relation to slavery . . . whose inevitable consequences must be the overthrow and destruction of our government.” *Scott v. Emerson*, 15 Mo. 576, 586 (1852). Rejecting Dred Scott’s federal claim, the United States Supreme Court referred to slavery’s “controversies . . . [that] have occasioned most peril to the peace of the Union....” *Scott v. Sandford*, 60 U.S. 393, 516 (1856).

⁵ See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that indefinite detention and denial of access to counsel and to judicial tribunal of U.S. citizen captured on foreign soil and deemed an enemy combatant is not unconstitutional *per se*). But cf. *Hamdi v. Rumsfeld*, 126 S. Ct. 2749 (2006) (holding that a defendant is entitled to federal habeas corpus hearing to challenge denial of due process guarantees provided by military and international law).

⁶ 407 U.S. 25 (1972).

⁷ *Id.* at 36. (where the Supreme Court referred to “the prejudice which results to misdemeanor defendants from this ‘assembly-line justice.’”) The Court described the “picture” of the usual misdemeanor trial that “is characterized by insufficient and frequently irresponsible preparation on the part of the defense, the prosecution, and the court. Everything is rush, rush.” *Id.* at 35 (citing William E. Hellerstein, *The Importance of the Misdemeanor Case on Trial and Appeal*, 28 LEGAL AID BRIEFCASE 151, 152 (1970)). See *infra* notes 11–13.

⁸ *Id.* at 35 (citing Dean Edward Barrett and a report by the President’s Commission on Law Enforcement and Administration of Justice).

⁹ *Id.*

liberty.”¹⁰ Acknowledging that counsel’s presence at every stage “may well add large new burdens on a profession already overtaxed,” the Chief Justice optimistically predicted the “dynamics of the profession” would meet the challenge.¹¹

Has the profession responded adequately to Chief Justice Burger’s challenge since *Argersinger* was decided? Should indigent defendants, who comprise most of the people prosecuted in state court, now expect a lawyer’s advocacy “at all criminal proceedings,” beginning with the initial bail or pretrial release appearance? Or is the reality of *Argersinger*’s right to counsel applicable to representation at a considerably later stage in state misdemeanor proceedings, such as when an incarcerated defendant is considering whether to accept a plea, or at trial itself?¹² And what has happened to “assembly line justice” in our nation’s lower criminal courts?”

Criminal procedure textbooks¹³ shed minimal light on these important questions. More than thirty five years after *Gideon* and *Argersinger* brought the public spotlight on states’ failure to guarantee counsel at trial, it is the rare text that tells about the national saga in which most indigent defendants trek through state

¹⁰ *Id.* at 43 (emphasis added) (where the ABA Project on Standards for Criminal Justice concluded that “[c]ounsel should be provided in all criminal proceedings for offenses punishable by loss of liberty, except those types of offenses for which such punishment is not likely to be imposed, regardless of their denomination as felonies, misdemeanors or otherwise.”)

¹¹ *Id.* at 44.

¹² In *Argersinger*, the Supreme Court focused on “the guilty plea, a problem which looms large in misdemeanor as well as in felony cases.” 407 U.S. 25, 34 (1972). The Court described counsel’s critical role in counseling indigents whether to go to trial or negotiate a guilty plea so that the defendant “may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison....” *Id.*

¹³ For this article, I wanted to focus on the most frequently assigned casebooks, but publishers were reluctant to reveal the “best-sellers.” Consequently, I reviewed fourteen casebooks and one hornbook that I received from publishing companies: RONALD JAY ALLEN ET AL., *COMPREHENSIVE CRIMINAL PROCEDURE* (2d ed. 2005); NEIL P. COHEN & DONALD J. HALL, *CRIMINAL PROCEDURE: THE POST-INVESTIGATIVE PROCESS, CASES AND MATERIALS* (2d ed. 2000); JOSEPH G. COOK & PAUL MARCUS, *CRIMINAL PROCEDURE* (6th ed. 2005); JOSHUA DRESSLER & GEORGE C. THOMAS III, *CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES* (2d ed. 2003); PHILIP E. JOHNSON & MORGAN CLOUD, *CONSTITUTIONAL CRIMINAL PROCEDURE: FROM INVESTIGATION TO TRIAL* (4th ed. 2005); YALE KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE: CASES—COMMENTS—QUESTIONS* (11th ed. 2005); WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* (4th ed. 2004) (hornbook); ARNOLD H. LOEWY, *CRIMINAL PROCEDURE: CASES, MATERIALS AND QUESTIONS* (2d ed. 2006); ARTHUR R. MILLER & CHARLES A. WRIGHT, *CRIMINAL PROCEDURES: CASES, STATUTES AND EXECUTIVE MATERIALS* (2d ed. 2003); MYRON MOSKOVITZ, *CASES AND PROBLEMS IN CRIMINAL PROCEDURE: THE COURTROOM* (4th ed. 2004); STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY* (7th ed. 2004); ANDREW E. TASLITZ & MARGARET L. PARIS, *CONSTITUTIONAL CRIMINAL PROCEDURE* (2d ed. 2003); RUSSELL L. WEAVER ET AL., *CRIMINAL PROCEDURE: CASES, PROBLEMS AND EXERCISES* (2d ed. 2004); LLOYD L. WEINREB, *CASES, COMMENT, QUESTIONS* (7th ed. 2004); and CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS* (4th ed. 2000).

court pretrial systems where they must defend themselves at the bail stage¹⁴ and where they often do not meet their assigned counsel until the next court appearance.¹⁵ While some texts distinguish themselves for suggesting to law students that today's indigent defendants may be without counsel at bail hearings,¹⁶ none examine whether *Argersinger's* description of "assembly-line justice" still holds true in the lower criminal courts.¹⁷ This oversight obfuscates the crucial importance of a defender at the beginning stages of a criminal prosecution when counsel's presence is "most critical"¹⁸ for protecting individual liberty, conducting

¹⁴ The following examples illustrate casebook authors' tendency to avoid mention that *Gideon's* guarantee of counsel does not translate to a lawyer's advocacy at indigent defendants' initial appearance or bail hearing: DRESSLER & THOMAS, *supra* note 13; JOHNSON & CLOUD, *supra* note 13; LOEWY, *supra* note 13; MILLER & WRIGHT, *supra* note 13; MOSKOVITZ, *supra* note 13; SALTZBURG & CAPRA, *supra* note 13; WEAVER ET AL., *supra* note 13; TASLITZ & PARIS, *supra* note 13; and WEINREB, *supra* note 13.

¹⁵ Only eight states uniformly provide a lawyer to an indigent defendant at the initial appearance and bail stage. Douglas L. Colbert, *Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1, 8–10 [hereinafter Colbert, *Thirty-Five Years*]. In eighteen states, a poor person is systematically denied counsel statewide; twenty-four states ensure counsel only in one or two jurisdictions. Counsel's delay may range from days to weeks to as long as two to four months. *Id.* at 10–11. See also Douglas C. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1727 (2002).

¹⁶ Only one text directly indicates that an accused is not assigned counsel at a bail proceeding. See COHEN & HALL, *supra* note 13, at 92 ("In many cases, the defendant is not represented by counsel at the bail hearing."). Several authors make a strong argument in favor of considering bail a "critical stage," that requires states to provide representation. See *infra* note 31; WHITEBREAD & SLOBOGIN, *supra* note 13, at 906–11 (where the authors conclude that "given the fact that the bail hearing involves both the prosecutor and the defendant, as well as cross-examination of prosecution witnesses, it is likely to be considered a "critical stage.") *Id.* at 910; LAFAYE ET AL., *supra* note 13, at 650 ("Because counsel for the defendant can make such an impact at the bail hearing, there is much to be said for the contention that the Sixth Amendment right to counsel applies at that time."); COOK & MARCUS, *supra* note 13, at 593. Some authors ask students to consider whether bail is a critical stage and provide empirical data to support the argument that representation significantly affects the outcome. ALLEN ET AL., *supra* note 13, at 1118 n.4. Others raise the issue for students' consideration. See KAMISAR ET AL., *supra* note 13 at 957.

¹⁷ Some texts do not include *Argersinger*, either as an excerpted court opinion or for extensive discussion in the notes section. See, e.g., COHEN & HALL, *supra* note 13; LOEWY, *supra* note 13; MOSKOVITZ, *supra* note 13; TASLITZ & PARIS, *supra* note 13; JOHNSON & CLOUD, *supra* note 13; WEINREB, *supra* note 13. Of the authors who devoted space for *Argersinger* in their casebook, each chose to omit the Supreme Court's designation and extensive description of "assembly line justice" in lower state courts where most defendants are prosecuted and where virtually everyone appears. Eliminating the "assembly line justice" language deprives students of exploring how a justice system functions without lawyers, and of appreciating assigned counsel's limited role and often belated appearance at criminal proceedings. See *supra* notes 6–12 and accompanying text.

¹⁸ *Powell v. Alabama*, 287 U.S. 45, 57 (1932) (holding that a capital defendant's due process right to counsel commences at "the most critical period of the proceedings . . . from the time of . . . arraignment until the beginning of . . . trial, when consultation, thorough-going investigation and preparation [are] vitally important").

a “thorough-going investigation,”¹⁹ preparing a defense, evaluating the government’s case and otherwise ensuring an accused’s right to a fair trial. As discussed below, a lawyer’s representation at bail is also essential to shield the unrepresented defendant from speaking and making inculpatory statements that may “reduce the trial itself to a mere formality.”²⁰ Yet textbook authors, and presumably most classroom professors, say very little about the invisibility of defense lawyers when accused indigents first appear in court.

Consequently, when judged against the material they read in the assigned textbook, I am not surprised when upper-level students declare that, after studying criminal procedure, they had a strong impression that all is well in the pretrial system: following arrest, they believe that poor people are represented by a lawyer, that counsel is present to protect individual liberty before trial, and that the judicial system stands ready to correct a glaring gap in representation. Few are told that Chief Justice Burger’s optimism in 1972 has neither been matched by state legislatures’ generosity in funding appointed counsel nor by state bar associations’ call for enhanced representation to indigent defendants. It is only when my students observed actual court proceedings that they became aware of how many defendants did not have a lawyer at a bail hearing and how many met counsel for the first time on the next court date when a misdemeanor trial or felony preliminary hearing would be scheduled.

In brief, while most criminal procedure textbooks dutifully report about the evolution of the right to counsel, they do not elaborate on *Gideon*’s irrelevance at the bail stage. Nor do they speak to *Argersinger*’s reality in the often chaotic conditions prevailing in states’ lower criminal courts. Do criminal procedure textbook authors lose interest in the importance and real meaning of the Sixth Amendment right to counsel for the people entering the criminal justice system? Or do they just assume *Gideon*’s promise has been fulfilled? Is this approach indicative of a greater divide between those who teach from those who practice, or from those more familiar with prosecution than criminal defense? Or is the limited Sixth Amendment textbook treatment reflective only of the tough choices an author must make when reviewing reported decisions and choosing material for inclusion?

Whatever the reason, ask a student or practicing lawyer today whether an accused’s constitutional right to counsel commences at the bail stage and continues thereafter, and, I predict, most will reply affirmatively. Is this a result of watching too many episodes of *Law and Order* and seeing the accused represented by counsel at New York City bail hearings and thereafter? Perhaps, but I think the problem is more serious. I believe we are missing an important opportunity to tell the full and honest story in our criminal procedure classes about the reality of

¹⁹ *Id.*

²⁰ *Gouveia v. United States*, 467 U.S. 180, 189 (1984) (quoting *United States v. Wade*, 388 U.S. 218, 224 (1967)).

counsel's limited guarantee in states' pretrial justice systems. Without exposing students to this information, professors relieve students from the responsibility of wrestling with the apparent inconsistency between indigent defendants' entitlement to counsel at or near trial and lack of accessibility to the constitutional right when personal liberty is immediately at stake and when there is an immediate need to interview witnesses and commence a defense.

In this essay, I provide ample justification for expanding classroom discussion of *Gideon* and *Argersinger* to illustrate why these Supreme Court rulings have failed to guarantee representation at bail proceedings and during the investigation period leading to the next scheduled court proceeding. Indeed, I welcomed the invitation to speak and to publish this piece as an opportunity to place an academic spotlight on this long-overlooked problem of denying counsel to indigent defendants. I hope my article encourages authors who publish casebooks, and professors who teach Criminal Procedure courses, to revisit their teaching material and update students about *Gideon's* and *Argersinger's* realities in local and state courts. For reform to succeed and for the guarantee of counsel to be meaningful to indigent defendants at the front end of the system, I am convinced the academy must do more to provide awareness and appreciation of the unrepresented defendant at bail.

I. TEACHING *GIDEON* AND *ARGERSINGER*

Back in the early 1960s when Clarence Earl Gideon was denied a lawyer at his burglary trial, it was not because he fit the profile of a suspected terrorist. The State of Florida was merely following a time-honored tradition. Since the founding of our nation nearly 175 years earlier, states have had no legal duty to assign counsel to a poor person charged with committing a felony crime.²¹ Judges had grown accustomed to conducting trials without defense lawyers and seeing accused felons like Gideon stand alone and go through the motions of pretending they were capable of defending themselves against a legally trained and experienced prosecutor. Most everyone knew an uneducated poor person's self-representation had little chance of success, but they chose to remain silent and to maintain the "emperor has no clothes" illusion that justice without counsel was possible.

Appearing before a Florida trial court on a charge of breaking and entering a pool hall and stealing from a cigarette machine, Gideon was typical of many defendants; arrested frequently for non-violent crimes, Gideon had little formal education, supported himself with odd jobs, gambled, drank and often found

²¹ In *Powell v. Alabama*, 287 U.S. 45 (1932), the Supreme Court provided a historical overview of the limited meaning of the right to counsel during colonial and post-revolutionary America; see also *Betts v. Brady*, 316 U.S. 455, 461-65 (1942).

himself without money.²² Thus, Gideon remained incarcerated while awaiting trial because he could not afford bail.²³ Aware of his limited capability to defend himself, Gideon probably surprised the trial judge when he asked for a court-appointed lawyer. "Mr. Gideon, I am sorry," replied the judge, "but I cannot appoint counsel to represent you in this case [u]nder the laws of the State of Florida."²⁴ The trial judge's ruling was legally sound: in 1942 the Supreme Court had rejected a similar challenge by a Maryland defendant and approved the "usual practice" of denying a trial lawyer to an accused facing a felony charge.²⁵

Law professors may find the greatest pleasure in teaching the *Gideon* story by simply referring to the opinion's clear and straightforward language. Speaking for a unanimous Court, Justice Black exposed and rejected the legal fiction of an indigent defendant's ability to self-defend. Declaring that Gideon had done "about as well as could be expected from a layman,"²⁶ Justice Black reminded the nation and legal profession that the justice system's commitment to fairness and impartiality depended on trial counsel's presence. "[E]very defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."²⁷ Incorporating a due process right to counsel analysis that the Court had applied three decades earlier to reverse death sentences against eight defendants in *Powell v. Alabama*,²⁸ the infamous Scottsboro trial, the *Gideon* Court explained that "even the intelligent and educated layman . . . is incapable . . . [and] lacks the skill and knowledge adequately to prepare his defense . . . [without] the guiding hand of counsel at every step in the proceedings against him."²⁹ Prosecuting Gideon on felony

²² Anthony Lewis described Gideon "as a fifty-one year old white man who had been in and out of prisons much of his life . . . [but] [h]e had never been a professional criminal or man of violence." LEWIS, *supra* note 3, at 5. Growing up during the depression, Gideon had an eighth grade education, had difficulty holding onto a steady job and often relied on public assistance. *Id.* at 66–69, 72–74.

²³ Today nearly 475,000 incarcerated detainees await trial in state criminal court. Most remain in jail because they cannot post bail. PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 2005 (2006) (indicating that 62% of the 747,000 people incarcerated in local jails are awaiting trial). See International Center for Prison Studies website, *available at* <http://www.prisonstudies.org/>.

²⁴ *Gideon v. Wainwright*, 372 U.S. 335, 337 (1964).

²⁵ *Betts v. Brady*, 316 U.S. at 472 (rejecting a Sixth and Fourteenth Amendment right to counsel in felony cases); see also Douglas Colbert, *Coming Soon to a Court Near You—Convicting the Unrepresented at the Bail Stage: An Autopsy of a State High Court's Sua Sponte Rejection of Indigent Defendants' Right to Counsel*, 36 SETON HALL L. REV. 653, 705–06 (2006) [hereinafter Colbert, *Coming Soon to a Court*].

²⁶ 372 U.S. at 337.

²⁷ *Id.* at 344.

²⁸ 287 U.S. 45 (1932).

²⁹ *Gideon*, 372 U.S. at 345 (citing Justice Sutherland's majority ruling in *Powell*, 287 U.S. at 68–69).

charges without providing counsel violated his Sixth and Fourteenth Amendment rights, declared the Court.

More recently, the *Gideon* focus has shifted from the threshold issue of whether an accused is entitled to a defender to whether a defendant's right to "effective assistance"³⁰ can be reconciled with assigned counsel's high caseload, limited resources and lack of preparedness. Viewed from this perspective, *Gideon* may seem neither spectacular nor remarkable. But no one should underestimate what an exceptional case *Gideon* makes for classroom teaching nor minimize its significance and potential application for applying a similar approach to remedy today's problem of lawyers' absence from bail proceedings. At the time when *Gideon* was decided, the Supreme Court did the unthinkable. It mandated states to develop an indigent defense system that had not existed previously, one that would guarantee legal representation to indigent defendants in felony cases and subsequently, in misdemeanors and at critical pretrial stages,³¹ too. Henceforth, said Justice Black, "[a]ny person haled into court, who is too poor to hire a lawyer" must be guaranteed trial counsel to "be assured a fair trial."³² Fairness, said the unanimous Court, was the touchstone for considering "lawyers in criminal courts . . . necessities, not luxuries."³³ Ensuring every accused had an advocate was essential "to achieve a fair system of justice."³⁴ Justice Black answered those who complained that the states' expenses would be too great when he highlighted a distinguishing feature of our legal system: "[t]he right of one charged with crime to

³⁰ *Strickland v. Washington*, 466 U.S. 668 (1984) (creating a constitutional standard to assess whether an attorney provided effective representation). See, e.g., Kyong M. Lee, *Reinventing Gideon v. Wainwright: Holistic Defenders, Indigent Defendants and the Right to Counsel*, 31 AM. J. CRIM. L. 367, 373-79 (2004); Dennis E. Curtis & Judith Resnik, *Briefing Criminal Defense Lawyers*, 70 FORDHAM L. REV. 1615, 1620 (2002); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986); *State v. Peart*, 621 So. 2d 780 (La. 1993) (holding the New Orleans public defender system unconstitutional because of defenders' unreasonably high caseloads).

³¹ The *Gideon* Supreme Court held that the right to counsel was "so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory [on] the States." 372 U.S. at 340. Several years later in *United States v. Wade*, 388 U.S. 218, 235 (1967), the Supreme Court defined a critical stage as a pretrial confrontation in which counsel's presence was necessary to protect a defendant from evidence that could "determine the accused's fate" at trial. The Court's two-prong analysis required a showing that the pretrial confrontation posed a risk of "potential substantial prejudice to [the] defendant's rights," and that counsel's presence could "help avoid that prejudice." *Id.* at 227. Thereafter in *Kirby v. Illinois*, 406 U.S. 682, 689 (1972), the Court modified its Sixth Amendment analysis to require the "initiation of adversary judicial criminal proceedings," such as the filing of charges and a trial-like confrontation where the unrepresented accused "finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."

³² *Gideon*, 372 U.S. at 344.

³³ *Id.*

³⁴ *Id.*

counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”³⁵

Gideon tells a remarkable story about the lawyer’s role in advancing what was presumably a hopeless cause: the then radical notion that states had a constitutional obligation to ensure that every poor person received “the aid of counsel.”³⁶ The volunteer, *pro bono* efforts of private attorneys Abe Fortas and Abe Krash, partners in one of Washington D.C.’s prestigious law firms, gave substance to what Chief Justice Burger meant when he placed hope that the “dynamics of the profession” would answer the judicial call to defend the unrepresented. Similar actions and responses by leading members of the private bar may be the blueprint now needed to move the profession to fulfill the commitment to *Gideon*’s first principle of representation: once government initiates a criminal prosecution, lawyers must be considered “necessities, not luxuries” at the bail stage in order to “achieve a fair system of justice.”

II. ARGERSINGER V. HAMLIN

Almost a decade later, *Gideon*’s accomplishment allowed the Supreme Court to add *Argersinger*’s important chapter on “assembly line justice” in the lower misdemeanor courts to the evolving right to counsel story. It was surely an account worth telling thirty five years ago and today’s version is no less compelling.

While generalities are always difficult, a walk inside a local courtroom today, particularly in an urban or high volume court setting, reveals a system still operating on *Argersinger*’s “rush, rush” and “let’s make a deal” principle. Perhaps criminal courts do not operate quite as fast as the way the justice system functioned back then, but the speed and depersonalization in which courts process people’s cases is much closer to the assembly line than to the individualized model one might have anticipated. Assigned defenders are few, and indigent defendants are many. Defenders can be heard calling names of unknown and previously unseen, soon-to-be clients. The more fortunate indigent defendant answers and listens to the assigned defender’s usually well-meaning yet hasty conversation with the puzzled look of a customer wondering whether to believe a sales person’s advice. Defendants without a lawyer prepare to ask for postponement or to request counsel. A lone prosecutor, or perhaps a second colleague also responsible for that day’s docket, assumes a clerk-like role in recording the proceedings and sorting defendants into common categories for possible dispositions. The prosecutor and presiding judge work together and share an “almost total preoccupation . . . with the movement of cases.”³⁷ They find it efficient to group defendants, dismissing

³⁵ *Id.*

³⁶ *Id.* at 343. In *Betts v. Brady*, 316 U.S. 455 (1942), the Supreme Court rejected virtually the identical right to counsel argument.

³⁷ *Argersinger*, 407 U.S. at 34.

some cases, taking a group plea for others on a minor nuisance charge, and accepting community service in lieu of full prosecution.

I assign students to witness these courtroom proceedings and to submit a reflection paper. Most find it an eye-opening experience. Invariably, students comment upon the rapid pace in which the judge and prosecutor move a court docket. It is so different from what they see on television and so much closer to their reading of *Argersinger*'s description of the lower court's operation. I also ask students to observe bail hearings. They are startled to see individual detainees speak for themselves and without a lawyer. Students wonder how a judge is able to render a fair decision when the accused remains in jail and appears on a television broadcast.³⁸ Others report that accused defendants, overwhelmingly African American, were transported to court but were brought before the judge in chains and handcuffs.³⁹ In class, students engage in lively discussion about their courtroom observations. The hands-on experience provides the most useful learning vehicle for teaching the importance of reading and carefully scrutinizing a court opinion.

Had *Gideon* and *Argersinger* succeeded in providing indigent defendants with access to counsel at their initial court appearance and during the pretrial stage, criminal procedure authors would have succeeded in covering the baseline material. As the next section explains, however, *Gideon* and *Argersinger* have not significantly altered the picture one is accustomed to witnessing in state courts. Many indigent defendants still stand alone and argue for pretrial release without legal representation—a situation reminiscent of past days when counsel was regarded as extraneous and non-essential to protecting an accused's liberty at judicial criminal proceedings.

III. RIGHT TO COUNSEL AT BAIL

As a law student, I studied *Gideon* and *Argersinger*. When I accepted my first job as a criminal defense lawyer with the New York City Legal Aid Society, I thanked my professors for preparing me to practice law and reminding me of the lawyer's potential for making a difference in people's lives. In the classroom, professors inspired students by bringing their attention to existing practices that they thought were ripe for challenge. Some even argued cases themselves that they thought would advance protection of constitutional rights for all. Many of my

³⁸ See, e.g., Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1114–19 (2004) (discussing courts' use of videoconferencing technology to bring criminal defendants to court without carefully evaluating the impact of that practice on the quality of justice).

³⁹ When I first arrived in Baltimore in 1994, city defendants appeared chained and handcuffed to one another; now they remain in jail and are among groups of twenty detainees who view court proceedings from the "bail room." Fifteen minutes away, Baltimore County detainees continue to remain handcuffed and chained to one another when appearing without counsel at the bail review hearing.

Legal Aid colleagues shared this attitude of wanting to contribute toward making equal justice a reality. As defenders of the poor, we found many opportunities to test our legal theory of the meaning of effective representation from the moment we began advocacy at our client's initial appearance. Whatever else may be said about New York City's busy lower criminal court system, an accused could always count on legal aid representation at a bail hearing.

Consequently, when I arrived in Maryland in 1994 after many years of city practice, I assumed that poor people everywhere in the United States were represented by counsel when they first appeared in court before a judicial officer. I soon learned that my Saul Steinberg-like view of the country was dead wrong.⁴⁰ When my students and I visited Baltimore city and other Maryland counties' initial Commissioner bail hearing that was conducted at a jail or police precinct, we never saw a lawyer present to advocate for an accused's release. Nor was a defender usually there to represent indigent defendants at the subsequent bail review hearing.⁴¹

I was determined to discover whether Maryland represented the norm or was an aberration, so I began looking at other state systems. I mailed surveys to the fifty states and to individual counties and defenders' offices.⁴² Reviewing the responses, I soon realized it was the rare state and locality that guaranteed counsel uniformly within its borders. Like other well-kept secrets, indigent defendants already knew the rule that the legal profession refused to acknowledge: do not expect a lawyer present when first appearing before a judicial officer at a bail hearing. Prepare to defend yourself.

As a courtroom observer, I found myself cringing at defendants' attempt to self-represent. Many would not have received Clarence Earl Gideon's "passing" grade after deciding to speak in an effort to gain pretrial release; they rarely succeeded in reducing bail. Even more seriously, their effort to regain liberty sometimes resulted in making an inculpatory statement that prosecutors could use to secure a conviction.

IV. *FENNER v. STATE*⁴³

The Maryland Court of Appeals' recent ruling in *Fenner v. State* adds another dimension to the significant consequences indigent defendants face when they are

⁴⁰ Artist Saul Steinberg's drawing *View of the World from 9th Avenue* shows a distorted view in which New York City occupies most of the country.

⁴¹ In Maryland's two-prong system, arrestees first appear before a District Court commissioner who makes the initial pretrial release determination. MD. R. 4-213. At commissioner hearings, indigent defendants are not represented by counsel. Thereafter, detainees who remain incarcerated appear in court or at a televised video bail review hearing; in most counties, a defender is not present.

⁴² Colbert, *Thirty-Five Years*, *supra* note 15, at 53–58.

⁴³ 846 A.2d 1020 (Md. 2004).

denied counsel at the bail stage. Left alone to speak, the unrepresented indigent defendant's attempt to regain liberty may result in uttering a statement that a prosecutor uses as evidence at trial.

In *Fenner*, the presiding bail review judge asked the unrepresented defendant, "Is there anything you'd like to tell me about yourself, sir?"⁴⁴ During his rambling reply, Mr. Fenner attempted to convince the judge that the \$150,000 bail previously set was meant for a major drug dealer, not for a user like himself who was charged with a fifty dollar transaction and who sold to support an addiction. "I'm not denying what happened," Fenner volunteered, prompting the judge to interrupt and offer the belated advice that he needed to speak to a lawyer and should say no more.⁴⁵ Fenner's words would prove extremely costly. They likely were the decisive evidence that convinced a jury to convict and a judge to impose a twenty-year jail sentence.⁴⁶

The Maryland Court of Appeals ruling was the first time a state court of last resort ruled that indigent defendants' constitutional right to counsel does not include representation at bail. Other states likely will face similar issues of admissibility as prosecutors realize *Fenner's* potential for gathering additional evidence against an unrepresented accused. Based on the Maryland high court's ruling, an able prosecutor would be wise to examine the transcript of a bail proceeding to determine whether the defendant's self-representation resulted in inculpatory or impeachment evidence. Prosecutors also may choose to actively participate at bail proceedings. They may ask the presiding judge to make a *Fenner*-inquiry to an unsuspecting and overmatched defendant, or in certain situations, the prosecutor may decide to speak and provoke a response from an unrepresented defendant. In sum, *Fenner's* rejection of counsel's mandatory presence at bail provides the prosecution with the capability to transform the bail hearing into an evidence gathering proceeding against accused indigent defendants.

Fenner should be included in criminal procedure textbooks. Faculty-led class discussions will allow students and soon-to-be attorneys to appreciate the similarities between *Fenner* and the pre-*Gideon* courtroom procedures and to recognize the drastic consequences to unrepresented criminal defendants who decide to speak at the bail hearing to gain a bail reduction or pretrial release.

As the following section reveals, most textbook authors have not yet connected the absence of counsel at bail to the pre-*Gideon* or pre-*Argersinger* centuries-old period. Nor have many highlighted that lawyers make a substantial

⁴⁴ *Id.* at 1023.

⁴⁵ *Id.* at 1023–24. The judge replied: "Sir, you need to have a lawyer just as soon as you can." *Id.*

⁴⁶ Colbert, *Coming Soon to a Court*, *supra* note 25, at 653–54, 669–73 (arguing that aside from the defendant's statement, the evidence of guilt was not overwhelming).

difference when advocating for pretrial release⁴⁷ for the individual defendant whose liberty before trial is at stake.

V. CRIMINAL PROCEDURE CASEBOOKS

Before reviewing colleagues' treatment of the right to counsel at bail and during pretrial proceedings in their criminal procedure casebooks, I must make several admissions and disclaimers. First, I have never authored a law textbook of any kind. I can only imagine the difficult editing choices that must be made. Second, I have general admiration and respect for those who do publish. They make it possible for us to succeed at teaching challenging course material. Third, I am concentrating only on a single aspect of covered material, indigents' right to counsel, in an entire course. Every book I examined had many plusses in their coverage of other important criminal procedure issues. Fourth, while I am very choosy in assigning the "best" book for students, especially for a large class like criminal procedure, I also recognize the imperfect selection process. Because of my interest in authors' treatment of indigents' right to counsel, I proceeded by closely examining their choice of reported cases and the selection of excerpted language and reading material following a main case. Having entered the academy after years of practice as a legal aid lawyer, I sought to measure the balance between theory and reality in authors' treatment of indigent defendants' right to counsel.

I reached several conclusions. First, most criminal procedure texts are heavily weighted toward covering the Fourth and Fifth Amendments.⁴⁸ When I ask law students what they learned in the course, few mention that they studied the Sixth Amendment right to counsel in depth or at all. Judging from criminal procedure

⁴⁷ It is the rare casebook that cites and explains the significant difference legal representation meant for people accused of non-violent crimes. Only two texts cite an empirical study conducted in Baltimore showing that judicial officers released represented defendants on recognizance 2.5 times more frequently than similarly-situated defendants who had no lawyer. In addition, the study revealed that judicial officers reduced bail to an affordable amount for a second group of represented defendants 2.5 times as often as they did for a similarly-situated group of unrepresented defendants. See COHEN & HALL, *supra* note 13, at 93; ALLEN ET AL., *supra* note 13, at 1118 n.4. Keeping in mind that roughly nine out of ten people arrested are charged with non-violent misdemeanor offenses prosecuted in states' lower criminal courts, the Baltimore Lawyers at Bail strongly supports the policy justifications for states' investing in early representation.

⁴⁸ Some authors clearly intended that their casebooks would focus on police practices and selected search and seizure and confession case material that comprised the bulk of their texts. See, e.g., COOK & MARCUS, *supra* note 13 (about 75% of text concentrated on the Fourth and Fifth Amendments and significant attention was given to the right to counsel, too); JOHNSON & CLOUD, *supra* note 13 (about 65%); LOEWY, *supra* note 13 (about 70%); TASLITZ & PARIS, *supra* note 13 (about 85%). More typically, authors devoted a substantial portion of their texts—roughly one third to one half—to the Fourth and Fifth Amendments. See, e.g., ALLEN ET AL., *supra* note 13 (about 40%); SALTZBURG, *supra* note 13 (about 45%); MILLER & WRIGHT, *supra* note 13 (about 40%); MOSKOVITZ, *supra* note 13 (about 40%); WHITEBREAD & SLOBOGIN, *supra* note 13 (43%); KAMISAR ET AL., *supra* note 13 (30%); WEAVER ET AL., *supra* note 13 (about 33%).

textbooks, this comes as no surprise. Most authors concentrate on including Fourth and Fifth Amendment Supreme Court rulings that illustrate the evolving balance between individual rights and law enforcement interests. Unquestionably these discussions are fascinating and important for today's students to understand the judiciary's usual deference to police action and issues related to racial profiling and interrogation practices. Yet, considering how predictable the legal challenges are to a police search or interrogation—judges invariably reject defendants' suppression motions—authors should revisit the extensive coverage they afford search and seizure and interrogation issues, particularly when these choices limit students from appreciating the under-attended Sixth Amendment right to counsel and the reality of indigent defendants' self-representation.

Second, most authors give little attention to indigent defendants' right to counsel. Though virtually every textbook includes an excerpted *Gideon*, the common ground ends there. On one end of the spectrum, there are authors who do a splendid job introducing students to the evolution of counsel from *Powell* to *Gideon* and *Argersinger*,⁴⁹ and who reference the continuing crisis in indigent defense representation.⁵⁰ At the other extreme are the more frequent casebooks that swiftly conclude the right to counsel analysis with a cursory review of *Argersinger*⁵¹ and never consider whether assembly line justice is still the norm in defenders' practice in the lower criminal courts.⁵² Authors turn instead to other Sixth Amendment issues, such as the distinction between an accused's right to counsel when sentenced to jail or to the growing case law interpreting the "effective assistance" of counsel standard. Considering that indigent defendants comprise 75–85% of criminal prosecutions, I found it perplexing that criminal procedure texts failed to highlight the widespread denial of accused indigents' most important right, the guarantee of a lawyer to defend and to advocate from the moment adversarial proceedings commence.⁵³ I thought about how professors

⁴⁹ See, e.g., COOK & MARCUS, *supra* note 13, at 479–510 (extensive *Betts-Gideon-Argersinger* case analysis); DRESSLER & THOMAS, *supra* note 13, at 1–14 (commences casebook by introducing students to *Powell*, *Scottsboro* and *Gideon*).

⁵⁰ See, e.g., ALLEN ET AL., *supra* note 13, at 163–67 nn.5–9 (representation of indigents); DRESSLER & THOMAS, *supra* note 13, at 916–21, 928–37 (excerpted articles dealing with indigent defense); MILLER & WRIGHT, *supra* note 13, at 730–57 (broad analysis of indigent defense systems); WEAVER ET AL., *supra* note 13, at 51–52 (indigent defense).

⁵¹ See *supra* note 17.

⁵² COHEN & HALL, *supra* note 13; LOEWY, *supra* note 13; MOSKOVITZ, *supra* note 13; TASLITZ & PARIS, *supra* note 13; JOHNSON & CLOUD, *supra* note 13; WEINREB, *supra* note 13.

⁵³ See KAMISAR ET AL., *supra* note 13, at 24–25 (indicating that four out of five defendants in the nation's largest seventy-five counties were represented by appointed counsel). Many texts devote a single page or note to describe the under-resourced defender's office, see, e.g., ALLEN ET AL., *supra* note 13, at 163–65, and focus instead on ineffective assistance. Occasionally, when describing the post-arrest process, a text introduces students to the criminal justice system through the well-to-do defendant who calls a private lawyer rather than through the MORE common experience of the poor person who, if lucky, will find a public defender, a stranger, present at the initial appearance. WEAVER ET AL., *supra* note 13, at 727. ("Invariably the first communication that defense counsel

would respond if asked to evaluate another country's justice system that denied counsel to an accused at the outset of a prosecution.

Third and most important, not a single text informs students of the hard truth: most poor people have no lawyer when first appearing in court or at bail proceedings. Few students are informed it is the rare state and locality where counsel is actually present; nor are they told that many detainees, who are disproportionately people of color, remain incarcerated for lengthy periods before seeing their counsel. In contrast, some texts portray the pretrial process in such a way that the reader could infer that accused indigents are represented at the initial stage.⁵⁴

On the brighter side, several authors do an exceptionally good job explaining the Supreme Court's constitutional critical stage analysis and suggesting that bail ought to be considered such a proceeding where states must provide counsel.⁵⁵ They make a compelling argument for indigent defendants' right to counsel at bail and provide the more adventurous and curious student a basis for examining the issue further. More common, however, are authors who devote a small section of their casebook to explain the critical stage analysis and who make no effort to apply the analysis to bail.⁵⁶

VI. CONCLUSION

I applaud law professors who present rulings like *Powell* and *Gideon* and *Argersinger* as a centerpiece of their criminal procedure course. Doing so provides

receives about a case is a telephone call from a defendant or the defendant's friends or relatives stating that the defendant has been arrested and wants to be immediately released on bail.").

⁵⁴ Sometimes authors provide an overview of the criminal process and indicate that defendants are brought before a court and informed about the right to counsel without clearly stating that they must self-represent at this stage. COOK & MARCUS, *supra* note 16, at 4; KAMISAR ET AL., *supra* note 16, at 13 ("at least where defendant is not accompanied by counsel, the magistrate will inform of the right to be represented by counsel and if indigent, the right to court-appointed counsel"). Authors also may inadvertently give the impression that counsel is present at bail hearings nationally. See, e.g., DRESSLER & THOMAS, *supra* note 13, at 903–05 (authors mention large cities' arraignment courts that operate 24/7 and then include a New York City attorney's description of his representation of indigent defendants at bail); ALLEN ET AL., *supra* note 13, at 56 (describing an indigent defendant's frustration in not gaining an attorney of choice may suggest he already had an attorney); TASLITZ & PARIS, *supra* note 13, at 50 (explaining the criminal process where a defendant is arrested and appears at arraignment where "he will enjoy certain important rights, such as the right to counsel. If the defendant is indigent, a public defender or private appointed counsel may be assigned to represent him." This may suggest legal representation is immediately available at the bail hearing.).

⁵⁵ See *supra* note 16.

⁵⁶ Others are very skimpy. See KAMISAR ET AL., *supra* note 13, at 95–96; TASLITZ & PARIS, *supra* note 13, at 805 nn.1–2; WEAVER ET AL., *supra* note 13, at 539–52 (lineups only; devotes one note to discussion); MILLER & WRIGHT, *supra* note 13 (short note on page 693–94 dealing with interrogation); ALLEN ET AL., *supra* note 13, at 167–68; SALTZBURG & CAPRA, *supra* note 13, at 852–54; LOEWY, *supra* note 13, at 613–61 (statements only).

context for understanding that it was not so long ago when poor people were left to defend themselves at felony and misdemeanor trials. Updating the current denial of counsel reality is important in order to overcome the danger that students and soon-to-be lawyers will take these showcase rulings as evidence that our legal system has fulfilled its “noble ideal” of providing counsel to the poor at the earliest stage of a criminal proceeding.

Today’s defendants face a *Gideon*-like situation when they first appear in state court before a judicial officer: they must defend their liberty without a lawyer to argue for pretrial release and to advise against making an inculpatory statement that is admissible at trial. Thereafter during the pretrial stage, indigent defendants may remain without a lawyer for lengthy periods before meeting their assigned defender.

Because law professors’ primary mission is to educate and prepare students for the practice of law, we must ask hard questions when reflecting on what we are teaching students about the Sixth and Fourteenth Amendments. Do our teaching responsibilities require that we identify and highlight the absence of counsel when an accused first appears in court? Should we motivate and encourage students to address the lack of representation at this crucial stage during their professional lives as part of their ethical responsibility to enhance the administration of justice? Had we been teaching in the pre-*Gideon* days, the answer would be easy. Most members of the academy would have focused students’ attention to the abysmal situation of an accused’s self-representation at trial.

Today’s defenseless defendant population deserves the same academic involvement and scrutiny of states’ pretrial systems that expect poor people to self-represent at bail. Criminal procedure authors and professors should require students to take a first-hand look at the existing courtroom practice in their locality and to report on *Gideon*’s reality. Better yet, professors should accompany their students to court and then facilitate discussion of *Gideon*’s and *Argersinger*’s theoretical ideal during the classes that follow.

We have reached the point when “the dynamics of the profession” make it essential for the academy to sound the *Gideon* II alarm. Law professors, especially those who author textbooks, have a special responsibility. We must inform students of a right to counsel crisis that only they, as future lawyers, are likely to solve.